87-267

No. _____

Supreme Court, U.S.
FILED
AUG 14 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1987

D.H. HOLMES CO., LTD.,

Appellant

versus

SHIRLEY McNAMARA,
SECRETARY OF REVENUE AND TAXATION,
THE DEPARTMENT OF REVENUE AND TAXATION,
STATE OF LOUISIANA,

Appellee

ON APPEAL FROM THE COURT OF APPEAL,
FOURTH CIRCUIT,
STATE OF LOUISIANA

JURISDICTIONAL STATEMENT

Kenneth J. Servay
Andrew Rinker, Jr.*
CHAFFE, MC CALL, PHILLIPS,
TOLER & SARPY
2300 Energy Centre
1100 Poydras Street
New Orleans, LA 70163-2300
(504) 585-7000
Counsel for Appellant,
D.H. Holmes Co., Ltd.

* Counsel of Record

QUESTION PRESENTED

Whether provisions of the Louisiana use tax law, La. Rev. Stat. §§ 47:302(A)(2), 47:305(E) and 47:321(A) are violative of the Commerce Clause, Article I, Section 8, Clause 3 of the Constitution of the United States, as applied to assess against appellant a tax on merchandise catalogs sent by United States Mail directly from out-of-state printers to the mailboxes of Louisiana recipients, free of charge to the recipients, without appellant ever having any proprietary interest in the catalogs while located in the State of Louisiana.

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were appellant, D.H. Holmes Co., Ltd., and appellee, Shirley McNamara, Secretary of Revenue and Taxation, the Department of Revenue and Taxation, State of Louisiana. The same parties are before this Court.

Appellant, D.H. Holmes Co., Ltd., has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1.

TABLE OF CONTENTS

Question Presented i

List of Parties and Rule 28.1 List ii

Table of Contents iii

Table of Authorities iv

Jurisdictional Statement 1

Opinions Below 2

Jurisdiction 2

Constitutional Provisions and Statutes 3

How the Federal Question Was Raised 5

Statement of the Case 6

The Question is Substantial 8

Conclusion 16

Appendix

Judgment and Opinion of Court of Appeal, Fourth Circuit, State of Louisiana 2A

Denial of Writ, The Supreme Court of the State of Louisiana 11A

Judgment of the Civil District Court for the Parish of Orleans, State of Louisiana 12A

Notice of Appeal to the Supreme Court of the United States 23A

Supplemental Notice of Appeal to the Supreme Court of the United States 27A

TABLE OF AUTHORITIES

PAGES

CASES

Carson Petroleum Co. v. Vial, 279 U.S. 95, 101, 49 S.Ct. 292, 73 L.Ed. 626 (1929) 9

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977) 7, 12, 13

Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies, 435 U.S. 734, 98 S.Ct. 1388, 55 L.Ed.2d 682 (1978) 7, 12, 13

District of Columbia v. W. Bell & Co., Inc., 420 A.2d 1208, 1210-11 and n.3 (D.C. App. 1980) 11, 14

Independent Warehouses, Inc. v. Scheele, 331 U.S. 70, 72-73, 67 S.Ct. 1062, 91 L.Ed. 1346, 1353 (1947) 9

McNamara v. D.H. Holmes, 505 So.2d 102, 105 (La. App. 4th Cir. 1987) ..... *passim*

Michelin Tire Corp. v. Wages, 423 U.S. 276, 302, 96 S.Ct. 535, 46 L.Ed.2d 495 (1976) 11

Miller Bros. Co. v. Maryland, 347 U.S. 340, 344, 74 S.Ct. 535, 98 L.Ed. 744 (1954) 11

Minnesota v. Blasius, 290 U.S. 1, 9, 10, 54 S.Ct. 34, 78 L.Ed. 131 (1933) 9

Service Merchandise Co., Inc. v. Tidwell, 529 S.W.2d 215 (Tenn. 1975) 11, 14

TABLE OF AUTHORITIES (Continued)

PAGES

CONSTITUTIONAL PROVISIONS

Article I, Section 8, Clause 3 of the United States Constitution ..... *passim*

STATUTES

La. Rev. Stat. § 47:302(A)(2) ..... i, 3

La. Rev. Stat. § 47:321(A) ..... i, 1, 3

La. Rev. Stat. § 47:321(A)(2) 1, 3

La. Rev. Stat. § 305(E) 1, 4, 8

28 U.S.C. § 1257(2) 2

OTHER AUTHORITIES

U.S. Supreme Court Rule 28.1 ii

U.S. Supreme Court Rule 28.5 2

La. Supreme Court Rule X, Section 4, Subsection (b) 2

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

D.H. HOLMES CO., LTD.,

Appellant

v.

SHIRLEY McNAMARA,
SECRETARY OF REVENUE AND TAXATION,
THE DEPARTMENT OF REVENUE AND TAXATION,
STATE OF LOUISIANA,

Appellee

ON APPEAL FROM THE COURT OF APPEAL,
FOURTH CIRCUIT,
STATE OF LOUISIANA

JURISDICTIONAL STATEMENT

D.H. Holmes Co., Ltd., the appellant, appeals from the final judgment of the Court of Appeal, Fourth Circuit, State of Louisiana, dated March 16, 1987, application for writ of certiorari denied by the Louisiana Supreme Court on May 29, 1987, holding that La. Rev. Stat. §§ 47:321(A)(2), 47:321(A), and 47:305(E), as applied in this case, are not unconstitutional as being violative of the Commerce Clause, Article I, Section 8, Clause 3 of the Constitution of the United States.

OPINIONS BELOW

The judgment and opinion of the Court of Appeal, Fourth Circuit, State of Louisiana, is reported at 505 So.2d 102 and appears at Appendix 2A-10A, *infra*, and the denial of appellant's application to the Louisiana Supreme Court for writ of certiorari, is reported at 506 So.2d 1224 and appears at Appendix 11A. The judgment and opinion of the trial court, the Civil District Court for the Parish of Orleans, State of Louisiana, is unreported and appears at Appendix 12A-22A.

JURISDICTION

The judgment of the Louisiana Court of Appeal, assessing a use tax against appellant on merchandise catalogs shipped in interstate commerce directly to Louisiana residents from out-of-state printers, was entered on March 16, 1987. *McNamara v. D.H. Holmes Co., Ltd.*, 505 So.2d 102 (La. App. 4th Cir. 1987); Appendix 2A. Appellant's application for writ of certiorari to the Supreme Court of Louisiana, timely filed on April 14, 1987,[1] was denied on May 29, 1987. 506 So.2d 1224; Appendix 11A.

Appellant filed its Notice of Appeal to this Court (Appendix 23A-24A) with both the Supreme Court of Louisiana and The Louisiana Court of Appeal, Fourth Circuit, on June 29, 1987. Appendix 23A[2]. This appeal is being docketed in this Court within ninety (90) days from the denial of appellant's application for writ of certiorari by the Louisiana Supreme Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

---

1. La. Supreme Court Rule X, Section 4, Subsection (b) provides, in pertinent part: "The application [for a writ of certiorari] shall be made within thirty days of the mailing of the notice of the original judgment of the court of appeal. . ."

2. Appellant filed a Supplemental Notice of Appeal on August 4, 1987, to assure that its Certificate of Service complied with all requirements of U.S. Supreme Court Rule 28.5.

CONSTITUTIONAL PROVISIONS AND STATUTES

Article I, Section 8, Clause 3 of the United States Constitution:

> The Congress shall have the power
>
> * * *
>
> 3. To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes;

La. Rev. Stat. § 47:302(A)(2):

> A. There is hereby levied a tax upon the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state, of each item or article of tangible personal property, as defined herein, the levy of said tax to be as follows:
>
> * * *
>
> (2) At the rate of two per centum (2%) of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed, or stored for use or consumption in this state; provided there shall be no duplication of the tax.

La. Rev. Stat. §47:321(A) provided:

> A. In addition to the tax levied by R.S. 47:302 (A) and collected under the provisions of Chapter 2 of Title 47, there is hereby levied an additional tax upon the sale at retail, the use, the consumption, the distribution, and

the storage for use or consumption in this state, of each item or article of tangible personal property, as defined in said Chapter 2 . . . the levy of said tax to be as follows:

* * *

(2) At the rate of one percent of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed or stored for use or consumption in this state, provided that there shall be no duplication of the tax.

La. Rev. Stat. § 47:305(E)[3] *provides:*

E. It is not the intention of this Chapter to levy a tax upon articles of tangible personal property imported into this state, or produced or manufactured in this state, for export; nor is it the intention of this Chapter to levy a tax on bonafide interstate commerce. It is, however, the intention of this Chapter to levy a tax on the sale at retail, the use, the consumption, the distribution, and the storage to be used or consumed in this state, of tangible property after it has come to rest in this state and has become a part of the mass of property in this state.

* * *

3. Paragraph 5 of La. Rev. Stat. § 47:305 was redesignated as Paragraph E in 1986.

HOW THE FEDERAL QUESTION WAS RAISED

Holmes raised its constitutional objections at the earliest stage of the proceedings below. In its Answer to the lawsuit filed by the State of Louisiana to collect the allegedly owed "use taxes," Holmes pleaded that the application of the Louisiana use tax statutes, assessing a tax on catalogs mailed in interstate commerce, violated the Commerce Clause. Subsequently, Holmes filed a summary judgment motion again urging the unconstitutionality of the tax statutes as applied against it. The trial court denied Holmes' motion. Holmes thereafter challenged the constitutionality of the assessment in its pre-trial memorandum, at trial and in its post-trial memorandum. The trial court Judgment expressly considered and rejected Holmes' constitutional challenge to the Louisiana tax statutes. *See* Appendix 12A at 13A, 21A-22A.

Holmes reiterated its constitutional challenge before the Louisiana Court of Appeal, Fourth Circuit. The Court of Appeal, like the trial court, upheld the statute as constitutional. *See* Court of Appeal decision, 505 So.2d 102, 105-106, Appendix 2A at 8A-9A. Thus, the Court of Appeal, like the trial court, expressly considered appellant's constitutional challenge to the application of the Louisiana use tax statutes, ruling in favor of the state statutes.

Holmes then timely filed an application for a writ of certiorari with the Supreme Court of Louisiana, again asserting that the Louisiana use tax statutes, as applied to assess a tax on its catalogs in interstate commerce, violated the Commerce Clause. On May 29, 1987, the Supreme Court of Louisiana, by a four-to-three vote, refused to hear the case, denying appellant's writ application. *See* 506 So.2d 1224, Appendix 11A. Holmes then timely filed its Notice of Appeal to this Court on June 29, 1987.

STATEMENT OF THE CASE

D.H. Holmes Company, Ltd., is a Louisiana corporation with its principal place of business and registered office in New Orleans, Louisiana. Holmes has department stores in various locations within Louisiana, as well as in other states.

During the calendar years 1979, 1980 and 1981, Holmes contracted with New York professionals to design merchandise catalogs to promote Holmes' merchandise and name and generate sales. Once prepared, the catalogs were printed in Oklahoma City, Boston, or Atlanta, and then delivered to the respective local offices of the United States Postal Service, postage prepaid, for direct mailing to select residents of Louisiana, Mississippi, and Alabama. Most of the catalogs (82%) were mailed to Louisiana residents directly from either Oklahoma City, Boston, or Atlanta.

The catalogs were delivered by the United States Postal Service from the Oklahoma City, Boston, or Atlanta post offices where they were mailed directly to the mailboxes of the Louisiana addressees. At no time did Holmes or any of its agents or employees receive or take possession of the catalogs mailed from Oklahoma City, Boston, or Atlanta.

Holmes absorbed the entire cost of these catalogs, including the cost of mailing. The recipients received the catalogs free of charge. Holmes ordered merchandise catalogs in 1979 at a cost of $520,000, in 1980 for $670,000 and in 1981 for $834,000.

The Louisiana Department of Revenue and Taxation (hereafter "State") audited Holmes' sales/use tax returns for the calendar years 1979, 1980 and 1981. The State assessed Holmes for delinquent use taxes on the value of the catalogs mailed directly from outside Louisiana to Louisiana residents. Holmes protested the State's assessment as to these catalogs, and the State filed suit.

Holmes answered the suit, expressly alleging that the application of the Louisiana use tax statute in imposing a tax on the catalogs mailed from out of state to Louisiana residents violated the Commerce Clause of the United States Constitution. Holmes subsequently filed a motion for summary judgment challenging application of the statute on this constitutional ground. The trial court denied Holmes summay judgment motion on March 21, 1984. Holmes repeatedly challenged the constitutionality of the use tax statutes during the proceedings in trial court. In its pre-trial memorandum, during trial, and in its post-trial memorandum, Holmes continually asserted the unconstitutionality of the state use tax statutes as applied to assess a tax on the catalogs mailed free of charge to Louisiana addressees from out of state. Nevertheless, the trial court rendered judgment in favor of the State. In ruling for the State, the trial court expressly considered and rejected Holmes' constitutional challenge to the application of the use tax statutes. *See* decision of the trial court, Appendix 12A at 13A, 21A-22A.

Holmes appealed the decision to the Louisiana Court of Appeal, Fourth Circuit, urging, *inter alia*, that the trial court erred in sustaining the validity of the application of use tax statutes against Holmes' constitutional challenge. The Fourth Circuit decision, rendered on March 16, 1987, affirmed the trial court's ruling, expressly considering and sustaining the validity of the state use tax statutes, and the assessments thereunder, and rejecting Holmes' Commerce Clause challenge. *McNamara v. D.H. Holmes*, 505 So.2d 102, 105-106 (La. App. 4th Cir. 1987); Appendix 2A at 8A-9A. The court analyzed the application of the tax statutes in light of *Complete Auto Transit v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977), and *Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies*, 435 U.S. 734, 98 S.Ct. 1388, 55 L.Ed.2d 682 (1978), finding that the application of the tax did not violate

the Commerce Clause. *McNamara*, 505 So.2d at 105-106, Appendix at 8A-9A. Thus, the Court of Appeal found that the tax was not within the exemption provided by La. Rev. Stat. § 47:305(E)[4] "on bona fide interstate commerce." *Id*.

Having no further right of appeal under Louisiana law, Holmes filed an application for writ of certiorari with the Supreme Court of Louisiana urging, *inter alia*, the unconstitutionality of the use tax statutes as applied. On May 29, 1987, The Supreme Court of Louisiana, by a 4-3 vote, refused to exercise its discretionary jurisdiction, denying Holmes' application for a writ of certiorari. 506 So.2d 1224, Appendix 11A. Holmes then timely filed its notice of appeal to this Court. Appendix 23A-25A.

THE QUESTION IS SUBSTANTIAL

This case presents the question, never before addressed by this Court, whether a state, consistent with the Commerce Clause, may apply its use tax statutes to assess a tax against a merchant on catalogs mailed in interstate commerce to its customers free of charge. While this Court has decided a number of Commerce Clause tax cases dealing with ***activities*** relating to commerce, and to ***goods*** sold for profit and shipped in interstate commerce, before and after they left the stream of commerce, no case decided by this Court addresses the issues presented by this case, or the relationship between these recent cases and this Court's long-established rule that ***goods*** in interstate commerce are not subject to taxation. Here, Louisiana's application of its use tax statute directly presents these issues. Holmes submits that the Louisiana use tax statutes, as applied in this case, violate the Commerce Clause.

---

4. See note *3, supra*.

The very heart of the Commerce Clause is the protection of *goods* in transit from state to state from taxation by state or local government. This Court most recently summarized this long-standing precept in *Independent Warehouses, Inc. v. Scheele*, 331 U.S. 70, 72-73, 67 S.Ct. 1062, 91 L.Ed. 1346, 1353 (1947):

> The governing principles were stated in *Minnesota v. Blasius*, 290 U.S. 1, 9, 10, 54 S.Ct. 34, 78 L.Ed. 131, as follows:
>
> > ". . . the States may not tax property in transit in interstate commerce. But, by reason of a break in the transit, the property may come to rest within a state and become subject to the power of the State to impose a nondiscriminatory property tax. Such an exertion of state power belongs to that class of cases in which, by virtue of the nature and importance of local concerns, the State may act until Congress, if it has paramount authority over the subject, substitutes its own regulation. The 'crucial question,' in determining whether the State's taxing power may thus be exerted, is that of 'continuity of transit.' *Carson Petroleum Co. v. Vial*, 279 U.S. 95, 101, 49 S.Ct. 292, 73 L.Ed. 626.

"If the interstate movement has not begun, the mere fact that such a movement is contemplated does not withdraw the property from the State's power to tax it. . . . If the interstate movement has begun, it may be regarded as continuing, so as to maintain the immunity of the property from state taxation, despite temporary interruptions due to the necessities of the journey or for the purpose of safety and convenience in the course of the movement. . . . Formalities, such as the forms of billing, and mere changes in the method of transportation do not affect the continuity of the transit. The question is always one of substance, and in each case it is necessary to consider the particular occasion or purpose of the interruption during which the tax is sought to be levied. . . .

"Where property has come to rest within a State, being held there at the pleasure of the owner, for disposal or use, so that he may dispose of it either within the State, or for shipment elsewhere, as his interest dictates, it is deemed to be part of the general mass

of property within the State and is thus subject to its taxing power."

More recently, this Court has recognized the continued sanctity of goods in transit in interstate commerce from taxation by the states. *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 302, 96 S.Ct. 535, 46 L.Ed.2d 495 (1976), (Export Clause case - the Court, in finding the goods in question taxable by the county, found that the goods had come to rest and were no longer in transit); *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344, 74 S.Ct. 535, 98 L.Ed. 744 (1954), (in *dicta*, the Court noted that a state could not impose a use tax on goods in transit in interstate commerce consistent with the Commerce Clause).

The state courts have also recognized the limitations imposed by the Commerce Clause in taxing goods sent in interstate commerce. *See, e.g., Service Merchandise Co., Inc. v. Tidwell*, 529 S.W.2d 215 (Tenn. 1975), (Tennessee Supreme Court held that the Commerce Clause prohibited imposition of use tax on a Tennessee merchant with regard to advertisement materials, including catalogs, promoting goods of the Tennessee merchant, which were shipped via private truck carrier and the U.S. Mail, from an out-of-state printer to Tennessee residents); *District of Columbia v. W. Bell & Co., Inc.*, 420 A.2d 1208, 1210-11 and n.3 (D.C. App. 1980) (while not reaching the constitutional issue, the court noted the trial court's finding that imposition of use tax on catalogs mailed to a Washington merchant's "in state" customers from a printer outside the District of Columbia was in violation of the Commerce Clause; the court noted the distinction between taxing ***goods*** while in the stream of commerce and taxing local business ***activity*** involving interstate commerce).

Louisiana's application of its use tax statutes in the present case directly violates the Commerce Clause prohibition against the taxation of goods while in the stream of interstate commerce. Here, the catalogs were designed and printed outside Louisiana; they were mailed in interstate commerce from the three out-of-state printers directly to the mailboxes of Louisiana recipients. There was no interruption in the journey of the catalogs from the out-of-state printers to the Louisiana recipients which arguably could provide the basis for the Louisiana assessment. The catalogs were printed, addressed, and mailed outside Louisiana. Holmes had no control over the catalogs once they were placed in the U.S. Mail outside the State of Louisiana; the catalogs were then in interstate commerce and remained in interstate commerce until they were retrieved from the mailboxes of the Louisiana addressees. At this point, Holmes had no control or ownership over the catalogs; they then belonged to the Louisiana addressees. There was no Louisiana point at which the catalogs belonged to Holmes providing the basis for a constitutional assessment of the use tax on the catalogs against Holmes. As the catalogs were mailed free of charge to the Louisiana recipients, there was no sale of goods by Holmes, inside or outside of Louisiana, upon which Louisiana could constitutionally base assessment of a use tax.

In upholding the tax statutes against Holmes' Commerce Clause attack, the Louisiana courts relied upon *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1971), and *Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies*, 435 U.S. 734, 98 S.Ct. 1388, 55 L.Ed.2d 682 (1978). The Louisiana Court of Appeal found that *Washington Stevedoring* established a four-part test to determine whether a statute violated the Commerce Clause:

> A tax statute can survive a Commerce Clause challenge if the tax: (1) is applied to an activity with a substantial nexus with the taxing state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to services provided by the state.

McNamara v. D.H. Holmes, 505 So.2d 102, 105 (La. App. 4th Cir. 1987); Appendix at 8A. The Louisiana court then continued, finding that application of the use tax statutes to impose the tax against the catalogs met this test. *Id.*, 505 So.2d at 106; Appendix at 9A. The Court of Appeal found the first part satisfied because of Holmes' Louisiana stores and customers. *Id.* The court held that imposition of the tax met the second and third parts of the test, because the tax applied equally to catalogs printed inside and outside of Louisiana. *Id.* It held the fourth part satisfied because, the State of Louisiana provides many benefits to Holmes. *Id.*

A substantial question is presented, because the Louisiana Court of Appeal's reliance on *Complete Auto Transit* and *Washington Stevedoring* is misplaced. While those cases plainly addressed the constitutionality of state or local taxation on *activities* of taxpayers within a taxing jurisdiction, they do not clearly address the taxation of *goods* in interstate commerce, particularly goods sent without charge to the recipient. *Complete Auto* and *Washington Stevedoring* involved taxes on *local activities*. In both *Complete Auto Transit* and *Washington Stevedoring*, relied upon by the Louisiana court, the tax imposed was in the nature of an occupational tax assessed on the taxpayer's business *activities* in the taxing jurisdiction. In this case, the use tax is being imposed on *goods* mailed in interstate commerce, *i.e.*, the free catalogs mailed postage pre-paid from outside Louisiana to Louisiana addressees. As the catalogs were designed, printed and mailed free from out of state, Holmes engaged in no

Louisiana use, sale or activity providing a constitutional basis for the tax assessment. A substantial question is presented concerning the applicability of *Complete Auto Transit* and *Washington Stevedoring* to this case.

Second, neither *Complete Auto Transit* nor *Washington Stevedoring*, nor any other case decided by this Court, expressly or impliedly overrules this Court's long-standing jurisprudence prohibiting taxation of *goods* in the stream of interstate commerce. As appellant argued below, and as the District of Columbia Court of Appeals found in *District of Columbia v. W. Bell & Co., Inc., supra*, ". . . tax[ation] of *goods* while they are *in* the stream of interstate commerce must be distinguished from a state tax on *business activity* involving interstate commerce." *Id.*, 420 A.2d at 1211 n.3 (emphasis added).

Third, the holding of the Louisiana Court of Appeal on the constitutional issue presented is directly contrary to the rulings of other courts which have considered the issue on virtually identical fact situations. In *Service Merchandise Co., Inc. v. Tidwell, supra*, the Tennessee Supreme Court held unconstitutional an application of the Tennessee use tax statutes seeking to tax catalogs sent in interstate commerce. There, Service Merchandise, a Tennessee merchant, had catalogs printed and addressed for mailing by a Minnesota firm. Afterwards, the catalogs were trucked directly from the printer in Minnesota to a regional post office in Tennessee where they were mailed to addresses both in and out of Tennessee. The Tennessee Supreme Court expressly held that Tennessee's imposition of the use tax on the catalogs as assessed against Service Merchandise, violated the Commerce Clause. *Id.* 529 S.W.2d 218-20. Similarly, in *W. Bell & Co., supra*, the District of Columbia Court of Appeals, in *dicta*, noted the unconstitutionality of the District's assessment of a tax on catalogs mailed in interstate commerce to District of Columbia recipients.

Finally, the ruling of the Louisiana Court of Appeal, upholding the Louisiana's extension of its use tax to impose a tax on catalogs mailed in the stream of commerce from other states, will have a serious detrimental impact on the free flow of goods in interstate commerce. Like Louisiana, most other states have use tax statutes. The continual decrease of federal aid, combined with the increasing need for new state revenues make this case immensely important to states and localities, to wholesale and retail merchants, and to consumers. The immediate impact of the decisions below is to render every free catalog or other advertisement flyer mailed in interstate commerce to a Louisiana addressee subject to the Louisiana use tax, with increased costs to merchants, and ultimately to consumers. The ultimate impact of this Louisiana decision is to extend this onerous Louisiana concept of interstate commerce taxation to all fifty states. In addition to the obvious monetary burden on the free flow of interstate commerce, such taxes will result in a nightmarish administrative burden on merchants mailing catalogs and other advertisement materials to addressees in multiple jurisdictions.

The application of the Louisiana use tax statutes in this case is contrary to this Court's long-established jurisprudence regarding taxation of goods in interstate commerce. The ruling of the Louisiana Court of Appeal on this important constitutional issue is directly contrary to the rulings of other state courts addresssing the identical issue under almost identical circumstances. The burden that the tax imposes on interstate commerce is substantial. This case presents a substantial and important constitutional question which should be fully briefed, orally argued, and addressed by a formal decision of this Court.

CONCLUSION

For the reasons discussed above, the Court should note probable jurisdiction of this appeal.

Respectfully submitted,

Kenneth J. Servay
Andrew Rinker, Jr.*
of
CHAFFE, McCALL, PHILLIPS,
TOLER & SARPY
2300 Energy Centre
1100 Poydras Street
New Orleans, LA 70163-2300
(504) 585-7000
Counsel for Appellant,
D.H. Holmes Co., Ltd.

---

* Counsel of Record

APPENDIX

APPENDIX

Judgment and Opinion, Court of Appeal, Fourth Circuit, State of Louisiana 2A

Writ Denial, The Supreme Court of the State of Louisiana 11A

Judgment and Reasons for Judgment, Civil District Court, Parish of Orleans, State of Louisiana 12A

Notice of Appeal to the Supreme Court of the United States 23A

Supplemental Notice of Appeal to the Supreme Court of the United States 27A

COURT OF APPEAL
FOURTH CIRCUIT
STATE OF LOUISIANA

NO. CA-6325

SHIRLEY McNAMARA,
SECRETARY OF REVENUE AND TAXATION,
THE DEPARTMENT OF REVENUE AND TAXATION,
STATE OF LOUISIANA

VERSUS

D. H. HOLMES COMPANY, LTD.

AN APPEAL FROM THE
CIVIL DISTRICT COURT,
FOR THE PARISH OF ORLEANS
NO. 83-15523
HONORABLE REVIUS ORTIQUE, JR.
JUDGE

DENIS A. BARRY
JUDGE

(Court composed of JJ James C. Gulotta, Denis A. Barry, and Charles R. Ward)

ROBERT G. PUGH
Pugh & Pugh
Suite 1200
3300 Marshall Street
Shreveport, Louisiana 71101-3051
(Attorney for Plaintiff)

WILLIAM F. GRACE, JR.
ANDREW RINKER, JR.
E. HOWELL CROSBY
Chaffe, McCall, Phillips, Toler & Sarpy
1500 First NBC Building
New Orleans, Louisiana 70112
(Attorney for Defendant)

MAR 16 1987

AFFIRMED

D. H. Holmes Company, Ltd. appeals a judgment in favor of the Louisiana Department of Revenue and Taxation for delinquent use taxes on its direct mail catalogs. It claims the State has violated the federal Commerce Clause.

Holmes, a Louisiana corporation with its principal place of business and registered office in New Orleans, has department stores in various locations within the state. In 1979-1981 Holmes contracted with New York companies to design merchandise catalogs which were printed in Oklahoma City, Boston or Atlanta and mailed from those cities to selected residents in Louisiana (about 82% of the catalogs), Mississippi and Alabama. About 1,000 catalogs are distributed from their Canal Street store.

Holmes paid for the catalogs' design, paper, printing and mailing which customers received without charge. The cost of four catalogs in 1979 was $520,000, six in 1980 cost $670,000, and nine in 1981 cost $834,000. Holmes did not pay sales taxes where the catalogs were printed or designed.

Holmes utilized the catalogs to advertise merchandise, to encourage sales, and for name recognition. The catalogs contained instructions to the postal carrier to leave them with the current resident if the addressee had moved. The return address was the Canal Street store.

The Louisiana Department of Revenue and Taxation conducted an audit of Holmes' tax returns for 1979-1981 and assessed the store for delinquent sales taxes on candy and use taxes (plus interest) on the value of the catalogs. Holmes protested and the State filed suit. Holmes answered that no use tax was due, that R.S. 47:305 authorizing taxation of loose candy was invalid, and that such taxes were violative of the Commerce Clause. Holmes' motion for summary judgment was denied, the case went to a bench trial, and a directed verdict on the catalog issue was denied. Both sides stipulated the amount allegedly due in use taxes on the catalogs and in sales tax on the candy (if the regulation was found valid or invalid).

The trial court concluded there was no constitutional violation; La. R.S. 47:305(5) as it affected the distribution of Holmes' catalogs was valid; and awarded the delinquent use taxes (stipulated at trial) plus statutory interest and attorney's fees. The court found the regulation at issue as to the candy sales invalid and rendered judgment accordingly. After judgment the court granted a new trial on the candy issue. The joint motion of the State and Holmes to dismiss without prejudice the candy sales tax issue (which had been compromised) was also granted. The court later restated the judgment to deny Holmes' motion for a new trial on the catalog issue and to render the same judgment on that issue.[1]

---

1. We note that the restated judgment incorrectly used the paragraph (from the first judgment) relating to the amount due on the candy issue, $49,710.

APPLICATION OF USE TAX

La. R. S. 47:302 provides in pertinent part:

> A. There is hereby levied a tax upon the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state, of each item or article of tangible personal property, as defined herein, the levy of said tax to be as follows:
>
> * * *
>
> (2) At the rate of two per centum (2%) of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed, or stored for use or consumption in this state; provided there shall be no duplication of tax.

La. R.S. 47:321 (pre-1983 amendment) similarly provides in pertinent part:

> A. In addition to the tax levied by R.S. 47:302 (A) and collected under the provisions of Chapter 2 of Title 47, there is hereby levied an additional tax upon the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state, of each item or article of tangible personal property, as defined in said Chapter 2, except upon drugs, orthotic and prosthetic devices and patient aids prescribed by physicians, for personal consumption or use, and except upon food which is exempt under the provisions of Subsection 3 of Section 305 of this Chapter; the levy of said tax to be as follows:

* * *

> (2) At the rate of one per centum of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed or stored for use or consumption in this state, provided that there shall be no duplication of the tax.

The statutory intent of the Louisiana use tax law is expressed in La. R.S. 47:305(5) which declares:

> (5) It is not the intention of this Chapter to levy a tax upon articles of tangible personal property imported into this state, or produced or manufactured in this state, for export; nor is it the intention of this Chapter to levy a tax on bona fide interstate commerce. It is, however, the intention of this Chapter to levy a tax on the sale at retail, the use, the consumption, the distribution, and the storage to be used or consumed in this state, of tangible personal property after it has become a part of the mass of property in this state.

The thrust of the use tax is that purchasers or users pay taxes on all tangible personal property bought or used within the taxing authority's jurisdiction. *Concordia Parish School Board v. Russ*, 491 So.2d 1368 (La. App. 3rd Cir. 1986), writ denied 496 So.2d 350 (La. 1986). Tangible personal property includes that which can be seen, weighed, measured, felt or touched or is in any other manner perceptible to the senses. La. R.S. 47:301(16). It is the same as movable property as used in property law. *Exxon Corporation v. Traigle*, 353 So.2d 314 (La. App. 1st Cir. 1977), writ denied 354 So.2d 1385 (La. 1978).

La. R.S. 47:302A(2) requires the levy of a tax upon each article of tangible personal property which is not sold, but brought into Louisiana for use. *Potashnick Construction, Inc. v. Louisiana Department of Revenue and Taxation*, 470 So.2d 526 (La. App. 1st Cir. 1985); *Sabine Pipe & Supply Company v. McNamara*, 411 So.2d 1167 (La. App. 1st Cir. 1982), writ denied 414 So.2d 1254 (La. 1982). Use includes the exercise of any right or power over tangible personal property incident to ownership thereof. The use tax includes use, consumption, distribution and storage. La. R.S. 47:301(18) and (19).

The use tax is levied on all tangible personal property imported from other states for use, consumption, distribution or storage in Louisiana just as if the articles have been sold at retail. La. R.S. 47:303(A). The taxable moment occurs "when the property has been withdrawn from interstate commerce and has become part of the mass of the property of the taxing state." *Mouton v. Klatex, Inc.*, 238 So.2d 1,3 (La. App. 1st Cir. 1970), writ refused 256 La. 873, 239 So.2d 365 (La. 1970), appeal dismissed 401 U.S. 968, 91 S.Ct. 1192, 28 L.Ed.2d 318 (1971). See also *Halliburton Oil Well Cementing Company v. Reily*, 373 U.S. 64, 83 S.Ct. 1201, 10 L.Ed.2d (1963) (Clark, J., joined by Black, J., dissenting). The use tax is to be computed on the retail price the property would have brought when imported. *Fontenot v. S. E. W. Oil Corporation*, 232 La. 1011, 95 So.2d 638 (1957).

Holmes purchased the catalogs out of state and paid for their mailing to addresses within Louisiana in order to further its sales. About 1,000 catalogs were distributed from its Canal Street store in New Orleans. 82% of the catalogs went to Louisiana residents who could purchase merchandise from stores within the state. After the catalogs were in Louisiana mailboxes they were not part of interstate commerce and became part of the property mass in this state. Distribution of the catalogs certainly constitutes "use" by Holmes under the statute and is subject to the tax.

COMMERCE CLAUSE

Holmes argues the use tax on catalogs mailed by out-of-state printers violates U.S. Const. Art. I, § 8, Cl. 3, the Commerce Clause.

In some instances a state may impose a tax on interstate commerce to collect its fair share of the cost of local government. *Sales Tax District No. 1 of LaFourche Parish v. Express Boat Company, Inc.*, 486 So.2d 947 (La. App. 1st Cir. 1986), affrm'd as amended 500 So.2d 364 (La. 1987). A state may constitutionally levy non-discriminatory, properly apportioned taxes even upon a foreign corporation when it is related to the corporation's local activities and the state is providing benefits and protection for the activity. *Mobile Oil Corporation v. Commissioner of Taxes of Vermont*, 445 U.S. 425, 100 S.Ct. 1223, 63 L.Ed.2d 510 (1980); *McNamara v. Electrode Corporation*, 418 So.2d 652 (La. App. 1st Cir. 1982), writ denied 420 So.2d 986 (La. 1982).

A state sales or use tax is not per se invalid because it burdens interstate commerce since interstate commerce may be made to pay its just share of the state tax burden. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977). Our statute declares it is not "the intention of this Chapter to levy a tax on bona fide interstate commerce." La. R.S. 47:305(5).

A tax statute can survive a Commerce Clause challenge if the tax: (1) is applied to an activity with a substantial nexus with the taxing state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to services provided by the state. *Department of Revenue of State of Washington v. Association of Washington Stevedoring Companies*, 435 U.S. 734, 98 S.Ct. 1388, 55 L.Ed.2d 682 (1978); *Complete Auto Transit, Inc. v. Brady, supra; Bunge Corporation v. Secretary of Department of Revenue and Taxation*, 419 So.2d 1288 (La. App. 5th Cir. 1982), writ denied 423 So.2d 1181 (La. 1982).

The nexus requirement is met because Holmes operates 13 stores intrastate. It has approximately 5,000 Louisiana employees, 500,000 charge customers, and 1,500,000 customers within the state. 82% of the total number of catalogs were mailed into Louisiana and 1,000 were distributed from the Canal Street store.

In order to find that the tax is fairly apportioned and lacks discrimination against interstate commerce requires a comparison to see if in-state and out-of-state taxpayers similarly situated are treated equally. *Modern Homes & Equipment, Inc. v. Collector of Revenue*, 422 So.2d 1237 (La. App. 1st Cir. 1982), writ denied 429 So.2d 128 (La. 1983). La. R.S. 47:305 has been applied to Holmes catalogs printed outside the state just as it is levied upon catalogs of other stores printed within the state. All of the catalogs are utilized to create sales in Louisiana to benefit Holmes and its employees. This tax does not create dissimilar treatment.

Louisiana provides many essential benefits and services for stores such as Holmes which should share the burden of local government. State Representative Claude Leach testified regarding the use of state funds for local government services that would directly benefit Holmes and its employees. The store does not pay taxes where the catalogs are printed so there is no multiplicity of taxes.

We agree that these facts meet the four-pronged test and there is no violation of the Commerce Clause. The record supports the assessment of use taxes on the Holmes catalogs.

We note that the restated judgment erroneously uses the figure awarded in the first judgment as to the candy issue, $49,710.00 (stipulated to at trial), which had been dismissed after a new trial was granted. We therefore amend the restated judgment to reflect the amount due in delinquent use taxes on the catalogs as declared in the first judgment and stipulated to at trial.

DECREE

The judgment is amended:

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the Petitioner, SHIRLEY McNAMARA, SECRETARY OF REVENUE AND TAXATION, THE DEPARTMENT OF REVENUE AND TAXATION, STATE OF LOUISIANA, and against the Respondent, D.H. HOLMES COMPANY, LTD., in the sum of Forty Three Thousand Nine Hundred and Thirty-Seven and 03/100 ($43,937.03), with statutory *interest* as provided for in La. R.S. 47:1601 and *attorney's fees* as provided in La. R.S. 47:1512.

AMENDED

THE SUPREME COURT OF THE STATE OF LOUISIANA

NO. 87 - C - 0824

SHIRLEY MCNAMARA,
SECRETARY OF REVENUE AND TAXATION,
THE DEPARTMENT OF REVENUE AND TAXATION,
STATE OF LOUISIANA

VS.

D. H. HOLMES COMPANY, LTD.

IN RE: D. H. Holmes Co. Ltd.;
Applying for Writ of Certiorari and/or Review;
to the Court of Appeal, Fourth Circuit, Number CA-6325;
Parish of Orleans Civil District Court Div. "H" Number 83-15523

May 29, 1987

Denied.

JLD
PFC
JCW
LFC

DIXON, C.J., MARCUS & LEMMON, JJ., would grant the writ.

Supreme Court of Louisiana
May 29, 1987

s/s Frans J. Labranche, Jr.
Clerk of Court
For the Court

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NUMBER: 83-15523

DIVISION: "H"

DOCKET: 4

SHIRLEY McNAMARA,
SECRETARY OF REVENUE AND TAXATION,
THE DEPARTMENT OF REVENUE AND TAXATION,
STATE OF LOUISIANA

versus

D.H. HOLMES COMPANY, LTD.

JUDGMENT

This cause was heard on March 19, and 20, 1985. At the close of the trial on the merits, the Court invited Counsel to submit "Post Trial Memoranda", regarding the constitutionality of "use tax" levied by the State of Louisiana on catalogs mailed to potential customers from outside the state to their residences in Louisiana. As always, the Court invited other comments by Counsel, should they deem it appropriate, but all submissions to be tendered not later than April 20, 1985. The Court regrets the delay in rendering this judgment, but wishes to assure the parties and their Counsel that the delay was unavoidable. The Court wishes to commend Counsel for submitting "in depth" and "well reasoned" Memoranda.

ROBERT G. PUGH, Esq.
- Counsel for the Petitioner,
HON. SHIRLEY McNAMARA,
Secretary,
THE DEPT. OF REVENUE AND
TAXATION, STATE OF LA.

Present:

ANDREW RINKER, JR., Esq.
WILLIAM F. GRACE, JR., Esq.
- Counsel for the Respondent,
D.H. HOLMES, CO., LTD.

CONSIDERING the pleadings filed herein, the evidence, the statutory law and the jurisprudence, together with the well written Memoranda submitted by Counsel;

The Court finds that there is no violation of the United States Constitution, more particularly the commerce clause thereof;

This Court finds that Article 47:305 of the Department's Regulations, pursuant to La. R.S. 47:1511, as it relates to the sale of candy at the D.H. Holmes Company, Ltd.-Candy Counter, is invalid and unenforceable;

FINALLY, this Court finds that the "use tax" imposed by the State of Louisiana under La. R.S. 47:305(5), as it affects the distribution of catalogs by D.H. Holmes Company, Ltd. is valid and enforceable.

The Court recognizes the "Stipulations" entered into by the parties, as follows:

1. As to the candy, the parties stipulated at trial that if the regulation at issue was declared valid the sales tax on the candy would be $35,216.40 (together with statutory interest and attorney fees on the aggregate thereof) or $49,710.00 (together with statutory interest and attorney fees on the aggregate thereof) if the regulation was declared invalid.

2. The parties also stipulated at trial that the use tax on the catalogs would be $43,937.03 (together with statutory interest and attorney fees on the aggregate thereof). This figure has been adjusted for the prescribed claim mentioned above.

ACCORDINGLY, for the reasons found by the Court in the accompanying "Reasons for Judgment", attached hereto and made a part hereof;

IT IS ORDERED, ADJUDGED AND DECREED that there is judgment herein in favor of the Petitioner, SHIRLEY McNAMARA, SECRETARY OF REVENUE AND TAXATION, THE DEPARTMENT OF REVENUE AND TAXATION, STATE OF LOUISIANA, and against the Respondent, D.H. HOLMES COMPANY, LTD., awarding to the said Petitioner, the sum of Forty Nine Thousand Seven Hundred and Ten and no/100, ($49,710.00), Dollars, together with statutory "*interest*" provided for in La. R.S. 47:1601 and "*attorney's fees*" provided in La. R.S. 47:1512;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there is judgment herein in favor of the Petitioner, SHIRLEY McNAMARA, SECRETARY OF REVENUE AND TAXATION, THE DEPARTMENT OF REVENUE AND TAXATION, STATE OF LOUISIANA, and

against the Respondent, D.H. HOLMES COMPANY, LTD., and awarding to the said Petitioner, the sum of Forty Three Thousand Nine Hundred and Thirty-Seven and 03/100, ($43,937.03), together with statutory "*interest*" provided for in La. R.S. 47:1601 and "*attorney's fees*" provided in La. R.S. 47:1512;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there is judgment herein in favor of the Respondent, D.H. HOLMES COMPANY, LTD., and against the Petitioner, SHIRLEY McNAMARA, SECRETARY OF REVENUE AND TAXATION, THE DEPARTMENT OF REVENUE AND TAXATION, STATE OF LOUISIANA, declaring that the bulk sales of candy at the said Respondent's candy counter falls within the exemptions of La. R.S. 305(4)(a)(xiv), and that any La. Dept. of Revenue Rules and/or Regulations to the contrary, are invalid and unenforceable;

EACH PARTY to bear their respective costs;

This 19th day of July 1985.
NEW ORLEANS, LOUISIANA

s/s Revius O. Ortique
J U D G E

A TRUE COPY

s/s E. White
DEPUTY CLERK, CIVIL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LA.

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NUMBER: 83-15523

DIVISION: "H"

DOCKET: 4

SHIRLEY McNAMARA,
SECRETARY OF REVENUE AND TAXATION,
THE DEPARTMENT OF REVENUE AND TAXATION,
STATE OF LOUISIANA

versus

D.H. HOLMES COMPANY, LTD.

REASONS FOR JUDGMENT

This action is brought by the Secretary of the Department of Revenue and Taxation against D.H. Holmes Company, Ltd. for failure to pay "use" and "sales" taxes during the calendar years 1979, 1980 and 1981. Following the audit, and in keeping with Revenue Department Rules and Regulations, the company was notified of the proposed assessments, with interest. D.H. Holmes Company, Ltd. refused to pay the alleged delinquent taxes and interest due thereon, and upon its refusal, this action was brought by the Secretary of the La. Department of Revenue and Taxation.

Petitioner claims that there are taxes due by D.H. Holmes Company, Ltd. as a result of Respondent selling candy at its

candy counter (sales tax), in New Orleans, as well as Respondent's distribution of catalogs (use tax) by mail to prospective customers, in Louisiana. During the trial, the parties stipulated that certain alleged taxes had prescribed and adjustment as to the amount due was appropriate and further stipulated as to the amount that would be due, depending upon who prevailed. These stipulations were made a part of the record.

This Court is impressed with the attack made by Counsel for Respondent on the applicability of La. R.S. 47:302A with respect to the sale of candy at the Holmes candy counters. This Court finds that it was the clear intention of the Louisiana Legislature to exempt the candy sold by D.H. Holmes. Prior to 1974, there were certain very specific exemptions. But it is clear that in 1974 our legislature amended the General Sales Tax Law to *increase* the number of exemptions and to state with greater specificity those food items which were exempt and those which were not. Subsequent legislation has followed and it continues to be clear that the candy sold at D.H. Holmes Candy Counter remain exempt.

Act 186 of 1974

Act 183 of 1984

La. R.S. 47:302A

La. R.S. 47:305

There is nothing in the language of La. R.S. 47:305(4)(a)(xiv) or La. R.S. 47:305(4)(c) which would indicate to this Court an intention on the part of our legislature not to include candy sales in the exemption. Obviously, La. R.S. 47:511 gives the Secretary of the Department the authority

to promulgate "reasonable rules and regulations" for the proper administration and enforcement of the provisions of law relative to the collection of revenues. However, the Department must be certain that the regulation is not so vague and indefinite as to cause it to be "unconstitutionally vague". The Court has studied carefully the evidence and argument of Counsel on this point and there are several aspects of the regulations which are so vague that the regulations are illegal and unenforceable. In this Court's view, the most obvious one is the Regulation which attempts to proscribe that a sale of candy is taxable or non-taxable depending upon the quantity of the sale. When one examines that regulation in the light of quantities sold on a daily basis, the result is almost ludicrous. This is especially true since there is no definition of what is "large" or "small" quantities. Suffice it to state that this Court has no difficulty in finding the regulation invalid, under the "void for vagueness doctrine" of the Fourteenth Amendment of the U.S. Constitution.

Grayned vs City of Rockford
408 U.S. 104 (1972)

See also the rationale of:

State vs. Baker (La. Sup. Ct.)
359 So.2d 110(1978)

Franklin vs First Money, Inc.
427 Fed. Supp. 66 (E.D. La.) (1976)

But even more importantly this Court is convinced that the Collector of Revenue is attempting to promulgate a regulation which broadens the applicability of a tax statute. Fundamental to our law of taxation is the principle that "tax laws are to be liberally interpreted in favor of the taxpayer and strictly construed against taxing authority, and any

doubt or ambiguity is to be resolved in favor of the taxpayer". The collector in an effort to circumvent the clear declaration of the statute has resorted to all manner of mental gymnastics to extend the reach of his authority. The creation of a standard which shifts the tax burden based on: a - whether the candy is or is not consumed on the premises; or b - whether it is sold in large or small quantities; or c - whether it is sold for preparation and consumption in the home or d - even whether a place where candy is sold is a "candy or nut counter" gives the taxing authority powers not delegated by our Legislature, and is therefore invalid!

McNamara vs Patterson Services, Inc.
382 So.2d 971 (1980)

Collector of Revenue vs Mossler Acceptance Corp.
139 So.2d 263 (1962)

In support of its contention that the value of catalogs mailed from New York directly to Louisiana residents is subject to the Louisiana "use tax", the Secretary relies on the statutory language of La. R.S. 47:302A(2) and La. R.S. 47:321A. Pertinent parts thereof are:

> A. There is hereby levied a tax upon the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state, of each item or article of tangible personal property, as defined herein, the levy of said tax to be as follows:
>
> (2) At the rate of two per centum (2%) of the cost price of each item or article of personal property, when the same is not sold but is used, consumed,

distributed, or stored for use or consumption in this state; provided that there shall be no duplication of the tax.

A. In addition to the tax levied by La. R.S. 47: 302A and collected under the provisions of Chapter 2 of Title 47, there is hereby levied an additional tax upon the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state, of each item or article of tangible personal property, as defined in said Chapter 2, except upon drugs, orthotic and prosthetic devices and patient aids prescribed by physicians for personal consumption or use, and except upon food which is exempt under the provisions of Subsection 3 of Section 305 of this Chapter; the levy of said tax to be as follows:

(2) at the rate of one percentum of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed or stored for use or consumption in this state; provided that there shall be no duplication of the tax.

The Respondent urges that D.H. Holmes never had sufficient possession of the catalogs to warrant the imposition of the "use tax" against it. This Court cannot agree.

First, it contended that our Louisiana laws specifically exempt interstate commerce from sales and use taxes. But this is clearly not a correct statement of the law. Our Courts have articulated "the test" for determining when a "use tax" can be imposed on articles or goods clearly in interstate commerce. While a state's rights to tax interstate commerce is limited, a tax can be imposed if the tax has substantial nexus with the taxing state and does not discriminate against interstate commerce and provided further, that it is fairly related to services provided by the taxing state. Considering the testimony of Respondent's Vice President - Controller, it is evidence that the distribution of the catalogs was directed toward residents of Lousiana and that the catalogs were intended for the use of D.H. Holmes in increasing its sales to potential customers who are residents of Louisiana. While it is true that a sales or use tax can be defeated by showing that there is a substantial risk of multiple taxation, there is no evidence that any such risk exists. Besides the burden to show such risk is upon the Respondent.

Bunge Corp. vs Secretary of Dept. of Revenue
419 So. 2d 1288 (1982)

This Court has reviewed the several legal authorities, cited by Counsel for Respondent, which would tend to adversely affect the constitutionality of the Louisiana Statute. However, it is clear that our statute was carefully drawn so as to avoid the pitfalls of statutes and jurisprudence emanating from these jurisdictions. A state tax on the activities of an interstate enterprise is valid if:

1) there is substantial nexus between the activity taxes and the taxing state;

2) the tax is fairly apportioned according to the scope of the intrastate business;

3) the tax does not discriminate against interstate commerce.

Our statute clearly comports with that law. It is in many respects the same as the one which has been shown to be viable in Mississippi. And as is obvious from a clear reading of the Bunge case, it has passed muster in our Courts.

A state tax is not per se invalid because it burdens interstate commerce since interstate commerce may constitutionally be made to pay its way.

Bunge Corp. vs Secretary of Dept. of Revenue,
cited supra.

Complete Auto Transit Inc. vs Brady
430 U.S. 274
97 S. Ct. 1076 (1977)

Once the catalogs reach the residences of the prospective customers to whom they are addressed, Louisiana taxing authority reaches the resting place of the catalogs.

A judgment will be entered accordingly.

This 19th day of July 1985.
NEW ORLEANS, LOUISIANA

s/s Revius O. Ortique
J U D G E

IN THE SUPREME COURT OF THE

STATE OF LOUISIANA

NO. 87 - C - 0824

SHIRLEY McNAMARA,
SECRETARY OF REVENUE AND TAXATION,
THE DEPARTMENT OF REVENUE AND TAXATION,
STATE OF LOUISIANA
Plaintiff and Respondent

versus

D.H. HOLMES COMPANY, LTD.
Defendent and Petitioner

COURT OF APPEAL - FOURTH CIRCUIT

STATE OF LOUISIANA

NO. CA-6325

SHIRLEY McNAMARA,
SECRETARY OF REVENUE AND TAXATION,
THE DEPARTMENT OF REVENUE AND TAXATION,
STATE OF LOUISIANA

versus

D.H. HOLMES COMPANY, LTD.

SUPREME COURT
OF LOUISIANA

Jun 29 3:34 PM '87

s/s Frans J. Labranche, Jr.
CLERK OF COURT
(stamp)

COURT OF APPEAL,
FOURTH CIRCUIT
FILED
JUN 29 1987

s/s Danielle Schott
CLERK OF COURT
(stamp)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES*

NOTICE IS HEREBY GIVEN that D.H. Holmes Company, Ltd., the petitioner and appellant respectively in the above-captioned proceedings, hereby appeals to the Supreme Court of the United States from the final judgment of the Louisiana Court of Appeal, Fourth Circuit, entered on March 16, 1987, and the denial by the Louisiana Supreme Court of the Application for Writ of Certiorari, filed by D.H. Holmes

* This document was prepared in duplicate original and filed with the Louisiana Court of Appeal, Fourth Circuit and the Supreme Court of Louisiana on June 29, 1987. A copy was served on the trial court and on counsel for appellee on the same date.

Company, Ltd., entered by the Louisiana Supreme Court on May 29, 1987.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Respectfully submitted,

CHAFFE, McCALL, PHILLIPS,
TOLER & SARPY

s/s Kenneth J. Servay
William F. Grace, Jr.
Kenneth J. Servay
Andrew Rinker, Jr.
2300 Energy Centre
1100 Poydras Street
New Orleans, Louisiana 70163-2300
Telephone: 585-7000

ATTORNEYS FOR APPELLANT,
D.H. HOLMES COMPANY, LTD.

CERTIFICATE OF SERVICE

I, Kenneth J. Servay, Counsel for D.H. Holmes Company, Ltd.., hereby certify that I have served the foregoing Notice of Appeal to The United States Supreme Court, upon the trial court of record, the Civil District Court for the Parish of Orleans. State of Louisiana, and on all counsel of record, this 29th day of June, 1987, by placing copies thereof, properly addressed to the trial court and each counsel of record, in the United States Mail, First Class Postage prepaid.

NEW ORLEANS, LOUISIANA, this 29th day of June, 1987.

s/s Kenneth J. Servay

IN THE SUPREME COURT OF THE

STATE OF LOUISIANA

NO. 87 - C - 0824

SHIRLEY McNAMARA,
SECRETARY OF REVENUE AND TAXATION,
THE DEPARTMENT OF REVENUE AND TAXATION,
STATE OF LOUISIANA,
Plaintiff and Respondent,

VERSUS

D.H. HOLMES COMPANY, LTD.,
Defendant and Petitioner

COURT OF APPEAL - FOURTH CIRCUIT

STATE OF LOUISIANA

NO. CA - 6325

SHIRLEY McNAMARA,
SECRETARY OF REVENUE AND TAXATION,
THE DEPARTMENT OF REVENUE AND TAXATION,
STATE OF LOUISIANA

VERSUS

D.H. HOLMES COMPANY, LTD.

SUPREME COURT
OF LOUISIANA

AUG 4 10:21 AM '87

s/s Frans J. Labranche, Jr.
CLERK OF COURT
(stamp)

COURT OF APPEAL,
FOURTH CIRCUIT
FILED AUG - 4 1987

s/s Danielle Schott
CLERK OF COURT
(stamp)

FILED

AUG 4 10:38 AM '87

CIVIL
DISTRICT COURT
(stamp)

SUPPLEMENTAL NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES**

NOTICE IS HEREBY GIVEN that D.H. Holmes Company, Ltd., the petitioner and appellant respectively in the above-captioned proceedings, hereby files this Supplemental Notice of Appeal to the Supreme Court of the United States from the final judgment of the Louisiana Court of Appeal, Fourth Circuit, entered on March 16, 1987, and the denial by the Louisiana Supreme Court of the Application for Writ of Certiorari filed by D.H. Holmes Company, Ltd., entered by the Louisiana Supreme Court on May 29, 1987.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Respectfully submitted,

**CHAFFE, MC CALL, PHILLIPS,
TOLER & SARPY**

s/s Kenneth J. Servay
William F. Grace, Jr.
Kenneth J. Servay
Andrew Rinker, Jr.
2300 Energy Centre
1100 Poydras Street
New Orleans, Louisiana 70163
Telephone: 504/585-7000

**ATTORNEYS FOR APPELLANT,
D.H. HOLMES COMPANY, LTD.**

** This document was prepared in duplicate original and filed with the Louisiana Court of Appeal, Fourth Circuit, and the Supreme Court of Louisiana on August 4, 1987. A copy was filed with the trial court, and a copy was served on counsel for appellee on that same date.

STATE OF LOUISIANA
PARISH OF ORLEANS

CERTIFICATE AND AFFIDAVIT OF SERVICE

I, Kenneth J. Servay, Counsel for D.H. Holmes Company, Ltd., and a member of the Louisiana State Bar and the Bar of the Supreme Court of the United States, being duly sworn, do state:

1. That on my behalf and at my instruction, members of my staff originally filed Notice of Appeal to the Supreme Court of the United States in the above captioned matters, together with Certificate of Service, with the Supreme Court of Louisiana and the Louisiana Court of Appeal, Fourth Circuit, on June 29, 1987, and that on that same date, my staff, at my instruction served that notice of appeal and certificate of service by United States Mail, First-Class Postage pre-paid, on the trial court and all counsel of record, as hereinafter listed:

Civil District Court for the
Parish of Orleans, State of
Louisiana
c/o Dan Foley, Clerk of Court
421 Loyola Avenue
New Orleans, Louisiana 70112
Trial Court

Robert G. Pugh, Esq.
Pugh & Pugh
Suite 1200
3300 Marshall Street
Shreveport, Louisiana 71101
As Attorney for Shirley McNamara,

Secretary of Revenue and Taxation, the Department of Revenue and Taxation, State of Louisiana

2. That on August 4, 1987, at my instruction, before instructing my staff to file this Supplemental Notice of Appeal and Certificate and Affidavit of Service with the Court of Appeal, Fourth Circuit, State of Louisiana, and the Supreme Court of Louisiana, and a copy on the Civil District Court for the Parish of Orleans (the trial court), I served a copy of this Supplemental Notice of Appeal and Certificate and Affidavit of Service, on Ms. Shirley McNamara, the sole appellee, by personally mailing to Mr. Robert G. Pugh, Esq., her counsel of record, a copy thereof, properly addressed as set forth in paragraph 1 and First Class Postage pre-paid.

NEW ORLEANS, LOUISIANA, this 4th day of August, 1987.

s/s Kenneth J. Servay
Kenneth J. Servay

STATE OF LOUISIANA
PARISH OF ORLEANS

Sworn to and subscribed before me, Nortary Public, this 4th day of August, 1987.

s/s Harvey G. Gleason
NOTARY PUBLIC, Parish of Orleans, State of Lóuisiana (My commission is for life)

s/s Kenneth J. Servay
Kenneth J. Servay